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No. 07-91

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In The

Supreme Court of the United States

TYSON A. DITCH,

Petitioner,

v.

JAMES L. GRACE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETTITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was Petitioner's denial of counsel at a state criminal preliminary hearing a constitutional "structural error," which contaminated the entire criminal proceedings against the Petitioner requiring automatic renewal of his conviction or a constitutional error subject to a harmless error analysis as determined by the Third Circuit Court of Appeals?

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SUMMARY OF REASONS TO DENY THE PETITION

There is no split of authority among Third Circuit Court of Appeals decisions on the legal test used to assess the denial of counsel at a state criminal preliminary hearing. The decision under review from the Third Circuit correctly states those tests. Petitioner disagrees with the application of settled law to his claim. Petitioner's dissatisfaction is not a compelling reason to grant review. Your Honorable Court divides constitutional errors into two classes. The first is called a "trial error." Trial errors are the errors occurring during the presentation of the case to the jury and their effect may be quantitatively accessed in the context of other evidence presented in order to determine whether the errors were harmless beyond a reasonable doubt. These include most constitutional errors.

The second class of constitutional errors is called "structural defects." These defy analysis by the harmless error standards because they effect the framework within which the trial proceeds and are not simply an error in the trial process itself.

Petitioner's dissatisfaction with the Third Circuit's decision is not a compelling reason to grant review. The Third Circuit in its opinion below, determined that lack of counsel at a state preliminary hearing was not a "structural error" requiring automatic reversal. Instead, it correctly analyzed the lack of counsel at a preliminary hearing by a harmless error analysis. The error the Petitioner complains of did not cast systematic doubt on the subsequent proceedings and did not "effect and contaminate" the entire trial by placing Petitioner in an ineradicable unfair disadvantage. A Sixth Amendment

violation requires automatic reversal only when the constitutional violation pervades the entire criminal proceeding. *Satterwhite v. Texas*, 486 U.S. 249 (1988).

STATEMENT OF THE CASE

Correct Statement of the Facts

On February 18, 1998, at approximately 2:45 a.m., Dasha Yenny, the victim and Petitioner's former girlfriend, reported to police that someone had shot a gun into the front door of the apartment where she, her three year old daughter, and her boyfriend Jeffrey Barksdale were sleeping. The police found a shell casing from a 9 mm bullet outside of the victim's apartment and believed that the numerous bullet holes found in the victim's door were made from a gun similar to this caliber. The victim told the investigating officer that she had recently received harassing telephone calls from Petitioner within several hours of the shooting in which Petitioner had threatened her with physical harm. The victim also related to the officer that Petitioner had been arrested in the past for harassing and physically abusing her.

Approximately twenty minutes after the shooting and while the police were at Dasha Yenny's residence the Petitioner called the victim numerous times by telephone. He asked the victim why she was telling the police he was doing something when his daughter was in the house. At that time the victim had only told the trooper who was standing beside her about the shooting. When the police officer attempted to speak to Petitioner, Petitioner terminated the calls. A phone trace of his calls determined that it had been originated at the residence of Petitioner's

brother. The victim informed the police that the Petitioner resided at his brother's residence. A firearms ownership inquiry determined that two 9 mm handguns were registered to Petitioner's brother.

A neighbor in an apartment near the victim's apartment, one Ronald Fry, reported to the investigating officer that he had heard shots fired into the victim's apartment. Fry further reported that he subsequently saw an individual leave the area and enter a white automobile. Fry stated that the white automobile then left the scene at approximately 3:30 a.m. Troopers from the Pennsylvania State Police drove to Petitioner's brother's residence and observed a white automobile parked nearby. The troopers felt the hood of the automobile and determined that it was still warm to the touch. Based upon the above information search warrants were issued. Later that morning the Pennsylvania State Police executed the search warrants at the residence of Petitioner's brother. During the course of the search the police found the Petitioner sleeping in the attic of the residence. Petitioner was the only occupant of the residence at the time of the search. Approximately fifteen feet away from Petitioner a 9 mm Ruger pistol was found under some clothing. The Pennsylvania State Police laboratory analyzed the 9 mm Ruger pistol and determined that it held ten rounds of ammunition, and that fragments from at least one of the bullets found at the apartment of Dasha Yenny were fired from this pistol. In addition, laboratory analysis also determined that one spent shell casing found at the scene was fired from the same gun.

At trial Ronald Fry made a positive independent in-court identification of the Petitioner as the person he saw at the victim's apartment building on February 18, 1998,

shortly after hearing gunshots in the corridor of the apartment building and male voice say "Open the damn door."

REASONS FOR DENYING THE PETITION

The Third Circuit Decision Was Correct

This Honorable Court has divided constitutional errors into two classes. The first is "trial errors," which occur during the presentation of the case to the jury. These are analyzed under the harmless error test. These include most constitutional errors. The second class of constitutional error is called "structural defects." These defy analysis by harmless error standards because they can effect the framework within which the trial proceeds. As such, if there is a constitutional structural error, automatic reversal is required.

If there is a violation of the Sixth Amendment right to counsel at a "critical stage" an inflexible rule of reversal is not warranted. Allowing district and circuit courts a flexible approach in deciding whether a Sixth Amendment violation is a constitutional trial error subject to the harmless error analysis or a structural error subject to an automatic reversal is the procedure that has been followed consistently by Circuit Courts and this Honorable Court. *Van v. Jones*, 475 F.3d 292 (6th Cir. 2007).

The Third Circuit correctly applied a harmless error standard to Petitioner's case involving the admission of evidence at trial of uncounseled pretrial identification. In doing so the court cited *Gilbert v. California*, 388 U.S. 263

(1967) and *Moore v. Illinois*, 434 U.S. 220 (1977). Further, the Third Circuit in its opinion stated:

> "Unlike the irreversible admission of guilt in *White v. Maryland*, 373 U.S. 59 (1963) the admission of an unconcealed identification does not necessarily 'pervade the entire proceeding,' nor is it 'necessarily unquantifiable and indeterminate, . . .'"

The Third Circuit Court also stated:

> "Because we cannot conclude that the denial of counsel at the preliminary hearing necessarily undermined the entire criminal proceeding, we will apply a harmless error analysis in this case."

(Third Circuit opinion, page 8)

Further, the Third Circuit Court found the strength of the prosecution's evidence not withstanding the eyewitness identification, as well as defense counsel's exhaustive examination of the eyewitness at trial raised substantial credibility problems with the identification. The court found the deprivation of petitioner's right to counsel at the preliminary hearing did not have a substantial and injurious effect on the jury's verdict. The denial of counsel at a preliminary hearing is not a "structural error" that requires automatic reversal of a conviction regardless of any prejudice to the defendant. *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970). In *Coleman*, although a preliminary hearing required by state law is a "critical stage" of the prosecution to which the right of counsel adheres, the Supreme Court nevertheless remanded the case to the State Court for consideration of whether the denial of counsel constituted harmless error. Reversal is automatically required only when the error occurs during a critical stage and "effects and contaminates" the entire trial. *United States v. Owen*, 407 F.3d 222 (4th Cir. 2005).

Contrary to Petitioner's assertion, the opinion of the Third Circuit under review does not create a new subset of Sixth Amendment violations involving complete denial of counsel at a critical stage that are not subject to the *United States v. Cronic*, 466 U.S. 648 (1984) presumption of prejudice. (Petition pages 7-8).

The Third Circuit opinion correctly applies *Coleman v. Alabama*, 399 U.S. 1 (1970). The Third Circuit determined that a state preliminary hearing is a critical stage. (Third Circuit opinion page 5). Further, the Third Circuit found Petitioner was entitled to counsel at a preliminary hearing. However, the Third Circuit correctly determined that Petitioner's denial of the Sixth Amendment right to counsel at a preliminary hearing was harmless error. Relying on *Coleman* the court held that though a preliminary hearing is a critical stage in the criminal process, a denial of counsel at a preliminary hearing "does not automatically warrant vacatur" (Third Circuit opinion page 7). Citing *Gilbert v. California*, 388 U.S. 263 (1967) and *Moore v. Illinois,* 434 U.S. 220 (1977). The Third Circuit held admission of Petitioner's identification made at a pretrial hearing without counsel is subject to the harmless error standard. Further, the Third Circuit correctly determined the presumption of prejudice as set forth in *United States v. Cronic,* 466 U.S. 648 (1984) only applies to structural error cases. (Third Circuit opinion page 9).

In *United States v. Gonzales-Lopez*, 126 S.Ct. 2557 (2006), the Supreme Court of the United States stated: "The touchstone of structural error is fundamental unfairness and unreliability. An automatic reversal is strong medicine that should be reserved for constitutional errors that 'always' or 'necessarily' produce unfairness." *Id.* at pg. 2570.

The Third Circuit properly analyzed Petitioner's case in its opinion. First it determined that the preliminary hearing was a critical stage and the Petitioner had a right to counsel at that hearing. It further determined that denial of counsel was a constitutional error. It also determined the pretrial identification of the Petitioner at the preliminary hearing by a witness was not a structural error, but a constitutional error subject to the harmless error test. In support thereof the court stated that the trial evidence against Petitioner was "substantial" including phone calls and threats to the victim before and after the shooting. In addition the court found there was substantial unchallenged ballistic evidence against the Petitioner. Specifically, that the 9 mm gun found near the Petitioner at the time of his arrest discharged, to the exclusion of all other firearms, the shell casings and bullet fragments found at the scene of the shooting.

CONCLUSION

The decision under review breaks no new ground. It does not decide an important question of federal law that has not been, which should be, settled by the Supreme Court. The holdings in the decision are consistent with relevant decisions of this Court. See, Supreme Court Rule 10(c). Petitioner's Petition merely disagrees with the application of settled law to his claim.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the petition. Respondent respectfully requests that the petition be denied.

Respectfully submitted,

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